ZAINUR ZAKARIA

V.

PP

COURT OF APPEAL, KUALA LUMPUR
LAMIN MOHD YUNUS PCA
AHMAD FAIRUZ JCA
MOKHTAR SIDIN JCA
[CRIMINAL APPEAL NO: W-05-83-98]
5 SEPTEMBER 2000

CRIMINAL PROCEDURE: *Contempt of court - Unsubstantiated allegation of fabrication of evidence by advocate/solicitor against deputy public prosecutors - Whether application to disqualify them constituted contempt of court - Whether fact that application was filed on client's instructions an exculpatory factor - Refusal of apology - Whether warranted sentence of three months' imprisonment*

CRIMINAL PROCEDURE: *Charge - Framing or particulars - Whether accused was informed of specific offence against him*

CRIMINAL PROCEDURE: *Contempt of court - Mens rea - Whether a necessary element in contempt offences*

The appellant is an advocate and solicitor. In the course of a criminal trial, the appellant on the instructions of his client, filed an application supported by an affidavit affirmed by his client seeking the disqualification of two deputy public prosecutors prosecuting his client.

The basis of the application was that the two deputy public prosecutors were involved in an attempt to fabricate evidence against the appellant's client. The appellant relied on a letter written by one Manjeet Singh Dhillon to the Attorney General and alleged that the contents of the said letter supported the allegation of an attempt to fabricate evidence.

The learned judge held that the application was baseless because it was totally unsupported by the documents exhibited therein and cited the appellant for contempt. Upon the appellant's refusal to apologise he was sentenced to three months' imprisonment. The appellant appealed.

Held:
Per Ahmad Fairuz JCA

[1] The letter by Manjeet Singh used the words "to give information" whereas the appellant's client's affidavit used the words "by falsely implicating me." The meaning of the two phrases were poles apart. Therefore the appellant's allegation of fabrication of evidence by the two deputy public prosecutors as contained in the affidavit in support of the application was not supported by the said letter.

[2] The appellant's application was an attempt to undermine the integrity of the trial of his client and was an abuse of the process of the court. The appellant's act and conduct was inherently likely to interfere with the administration of justice as a continuing process in the lower court. In the circumstances the learned judge was right in holding that the acts and conduct of the appellant sufficiently constituted contempt of court.

[3] The notes of evidence of the learned judge clearly showed that the charge distinctly stated the "specific offence" against the appellant. In the circumstances, the charge as framed against the appellant had complied with the principles laid down by the authorities.

[4] *Mens rea* is not a necessary element in contempt offences. The appellant's intention was immaterial and his contention that he was acting on his client's instructions was of no avail. The filing of the application by the appellant was scandalous, frivolous, vexatious and an abuse of the process of the court and consequently a contempt of court.

[5] The appellant had refused to apologise, although offered the opportunity to do so, before being cited for contempt. The appellant had also refused to apologise after being found guilty of contempt. Therefore, the sentence imposed was not excessive.

[Appeal against conviction and sentence dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu adalah seorang peguambela dan peguamcara. Dalam perjalanan sebuah perbicaraan jenayah perayu, atas arahan anakguamannya, telah memfailkan satu permohonan yang disokong oleh satu afidavit yang diikrarkan oleh anakguamannya yang memohon dilucutkan kelayakan dua orang Timbalan Pendakwa Raya yang mendakwa anakguamannya.

Dasar permohonan tersebut adalah bahawa kedua-dua timbalan pendakwa raya tersebut dalam satu percubaan untuk mereka palsu (fabricate) keterangan terhadap anakguaman perayu. Perayu telah bergantung pada sepucuk surat yang ditulis oleh seorang bernama Manjeet Singh Dhillon kepada Peguam Negara dan mendakwa bahawa kandungan surat tersebut menyokong dakwaan mengenai satu percubaan untuk merekapalsu keterangan.

Hakim yang bijaksana memutuskan bahawa permohonan tersebut tidak berasas kerana ianya tidak disokong sesungguhnya oleh dokumen-dokumen yang diekshibitkan di dalamnya dan menyebut perayu bagi penghinaan. Setelah perayu enggan untuk memohon maaf beliau telah dijatuhkan hukuman pemenjaraan selama tiga bulan. Perayu telah merayu.

Diputuskan:
Oleh Ahmad Fairuz HMR

[1] Surat oleh Manjeet Singh menggunakan perkataan-perkataan "to give information" sedangkan afidavit anakguaman perayu menggunakan perkataan-perkataan "by falsely implicating me". Makna kedua-dua ungkapan tersebut amat jauh. Oleh itu dakwaan merekapalsu keterangan oleh kedua-dua timbalan pendakwa raya sepertimana yang terkandung di dalam afidavit yang menyokong permohonan tersebut adalah tidak disokong oleh surat tersebut.

[2] Permohonan perayu merupakan satu percubaan untuk menjejaskan integriti perbicaraan anakguamannya dan merupakan satu penyalahgunaan proses mahkamah. Kelakuan dan perbuatan perayu adalah jelas berkemungkinan untuk mencampuri dengan pentadbiran keadilan sebagai satu proses yang berterusan dalam mahkamah rendah. Dalam keadaan tersebut hakim yang bijaksana adalah betul dalam memutuskan bahawa perbuatan-perbuatan dan kelakuan perayu secukupnya membentuk penghinaan mahkamah.

[3] Nota-nota keterangan hakim perbicaraan jelas menunjukkan bahawa pertuduhan dengan terangnya menyatakan "specific offence" terhadap perayu. Dalam keadaan tersebut pertuduhan itu sepertimana yang dirangkakan terhadap perayu telah mematuhi prinsip-prinsip yang dibentangkan oleh otoriti-otoriti.

[4] *Mens rea* bukannya merupakan unsur yang penting dalam kesalahan-kesalahan penghinaan. Niat perayu adalah tidak material dan penegasan beliau bahawa beliau bertindak atas arahan anakguamannya tidak bermakna. Pemfailan permohonan oleh perayu adalah melampau, remeh dan menyusahkan dan merupakan satu penyalahgunaan proses mahkamah dan akibatnya penghinaan mahkamah.

[5] Perayu telah enggan untuk memohon maaf, walaupun telah ditawarkan untuk berbuat sedemikian, sebelum disebut bagi penghinaan. Perayu telah juga enggan untuk memohon maaf selepas didapati bersalah kerana penghinaan. Dengan itu, hukuman yang dijatuhkan tidak keterlaluan.

[Rayuan terhadap sabitan dan hukuman ditolak.]

Case(s) referred to:

AG v. Butterworth [1963] 1 QB 696 ***(refd)***
AG v. Times Newspapers Ltd [1973] 3 All ER 54 ***(refd)***
AG v. Times Newspapers Ltd [1974] AC 273 ***(refd)***
AG Malaysia v. Manjeet Singh Dhillon [1991] 1 CLJ 216 ***(refd)***
Balogh v. Crown Court [1974] 3 All ER 283 ***(refd)***
Chandra Sri Ram v. Murray Hiebert [1997] 3 CLJ Supp 518 ***(refd)***
Cheah Cheng Hoc v. PP [1986] 1 CLJ 169 ***(refd)***
Coward v. Stapleton [90] CLR 573 ***(refd)***
Gamalath Ralalage Daniel Appuhaniy v. The Queen [1963] AC 474 ***(refd)***
Jaginder Singh & Ors v. AG [1983] 1 CLJ 69 ***(refd)***
Karam Singh v. PP [1975] 1 MLJ 229 ***(refd)***
MY Shareef v. Judges of Nagpur High Court AIR [1955] 19 ***(refd)***
R v. Griffin [88] Cr App R 63 ***(refd)***
Skipworth & The Defendant's case [1873] 9 LRQB 230 ***(refd)***
The St James' Evening Post Case [1742] 2 Atk 469 ***(refd)***
Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v. SM Idris & Anor and Another Application [1990] 1 CLJ 723 ***(refd)***
Yusof Ali Khan v. State PLD 970 SC 350 ***(refd)***

Legislation referred to:

Penal Code, s. 498

For the appellant - Raja Aziz Addruse (Hj Sulaiman Abdullah, Aris Rizal Christopher Fernando, Ambiga Sreenevasan, Md Ariff Md Yusof, Zulkifli Nordin, Christopher Leong, Sankara M Nair, Charmaine Chow with him); M/s Sivanathan & Assoc

For the respondent - Mohd Yusof Zainal Abidin (K Muniandy, Zauyah Bee Loth Khan, Shamsul Sulaiman); A-G' Chambers

Watching brief for Bar Council - Mah Weng Kwai & Roy Rajasingam

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-48 & 49-98; Criminal Application No: 44-115-98]

Reported by Satish Nair

JUDGMENT

Ahmad Fairuz JCA:

The appellant, an advocate and solicitor, practising in the law firm of Zainur Zakaria & Co, was convicted for contempt and sentenced to three months' imprisonment by the learned judge of the High Court of Malaya at Kuala Lumpur. The appellant appealed to this court. We heard oral arguments of the appeal on 21 and 22 March 2000. We then reserved judgment. We now hand down the following judgment.

The circumstances leading to the conviction of the appellant arose in the course of a criminal case in which the appellant was one of the defence counsel. The accused in the case was Dato' Seri Anwar Ibrahim (DSAI). The trial began on 2 November 1998. On 28 November 1998 DSAI applied *inter alia* to disqualify two deputy public prosecutors from continuing as prosecutors in his trial. The application and the affidavit of DSAI were filed by the appellant's firm on Saturday 28 November 1998.

The affidavit of DSAI exhibited a statutory declaration (SD) of one Mr Manjeet Singh Dhillon (MSD) as "DSAI-2". MSD is an advocate and solicitor of the High Court of Malaya and was counsel for Dato' Nallakaruppan a/l Solaimalai in Kuala Lumpur High Court Criminal Trial No 45-40-1998. In the SD, MSD referred to a letter written by him to the Honourable Attorney-General (AG). The letter was dated 12 October 1998 and was marked as "MSD-1". According to 'MSD-1', MSD met Dato' Abdul Gani Patail (AGP) at his office on 2 October 1998. At that meeting AGP expressed that he wanted Dato' Nallakaruppan, in exchange for a reduction of the charge against him (which charge carried a death sentence), in the words used in 'MSD-1', "to cooperate with them and to give information against Anwar Ibrahim, specifically on matters concerning several married women".

The SD also disclosed that 'MSD-1' was sent to the AG on 12 October 1998. On 13 October 1998 MSD met the AG. Nothing transpired at that meeting about the allegations in 'MSD-1'. The AG, however, mentioned that 'MSD-1' was not clear as to how Dato' Nallakaruppan would plead to an amended charge under the Arms Act. MSD responded that Dato' Nallakaruppan would plead guilty. The AG asked for a letter to confirm that and either he or Azhar would revert to MSD after that. On 14 October 1998 MSD sent out the letter confirming that Dato' Nallakaruppan would plead guilty on an amended charge. On 16 October 1998 MSD telephoned Azhar who confirmed having received the letter. In that telephone conversation Azhar was alleged to have said, in the words used in the SD,

"there would have to 'be something else' (ie more than just a plea of guilt to an amended change)". This is contained in para 7 of the SD which further stated:

> This 'something else' asked for by Encik Azahar was obviously what Dato' Gani had asked for on 2 October 1998 and confirmed to me a common approach to extracting evidence from Nallakaruppan a/l Solaimalai by using the I.S.A. 'death threat' as their bargaining chip.

Having referred to the SD and 'MSD-1', DSAI's affidavit, in its para 13, *inter alia*, stated:

> Dato' Abdul Gani Patail yang tersebut dahulu telah membayangkan (indicated) bahawa dia akan mempertimbangkan permintaan tersebut jika Datuk Nallakaruppan bersedia untuk bekerjasama dengan Kamar Peguam Negara dengan secara palsu membabitkan saya di dalam perlakuan kesalahan-kesalahan seksual dengan beberapa orang wanita yang telah atau belum berkahwin;

(The learned High Court judge had quoted the English version of this para 13 in his learned judgment and it reads:

> Dato' Abdul Gani Patail had indicated that he would consider the request if Datuk Nallakaruppan was prepared to co-operate with the Attorney-General's Chambers by falsely implicating me in the commission of sexual offences with various married and unmarried women;)

In para 16 of his affidavit DSAI said:

> Tindak-tanduk mereka yang dirujuk di atas menunjukkan kedua-dua Dato' Abdul Gani Patail dan Encik Azahar bin Mohamed telah menyalahgunakan kedudukan mereka sebagai pegawai-pegawai Kamar Peguam Negara dan sebagai pendakwa-pendakwa di dalam perbicaraan saya di sini, dengan mencuba sedaya upaya untuk membuatkan Datuk Nallakaruppan merekapalsu keterangan bagi membolehkan lebih banyak pertuduhan-pertuduhan dibuat terhadap saya berkenaan lain-lain kesalahan seksual yang dikatakan.

(The learned High Court judge, in his judgment quoted the English version of the paragraph thus:

> Their conduct referred to above shows both Dato' Abdul Gani Patail and Encik Azahar bin Mohamed to have abused their position as officers of the Attorney-General's Chambers and as prosecutors in my trial herein, by going out of their way to get Datuk Nallakaruppan to fabricate evidence in order to prefer more charges against me for other alleged sexual offences.)

In para. 18 of the affidavit DSAI said:

> Setelah menampakkan diri mereka sebagai amat tidak profesional di dalam perlaksanaan tanggungjawab mereka dan sebagai mempunyai kepentingan peribadi dalam mempastikan kesabitan kesalahan saya melalui cara yang boleh dipersoalkan, penglibatan mereka di dalam perbicaraan saya di sini telahpun membangkitkan keraguan yang mendalam terhadap keutuhan keterangan yang telah setakat ini dikemukakan oleh pihak pendakwaan.

(The English version as spelt out in the learned judge's judgment reads:

> Having shown themselves to be highly unprofessional in the performance of their duties and to be personally interested to secure my conviction by questionable means, their involvement in my trial herein has already raised grave doubts as to the integrity of the evidence which has so far been adduced by the prosecution.)

The above quoted para in particular led DSAI not to believe that it would be in the interests of justice for AGP and Dato' Azahar to proceed to conduct the prosecution against him.

The application was heard on 30 November 1998. According to the notes of evidence of the learned judge, the appellant at the request of the learned judge, read the SD and 'MSD-1'. In answer to the learned judge's question, the appellant agreed that the SD and 'MSD-l' formed the basis of DSAI's application. The learned judge then read out from various textbooks the law relating to accomplice evidence and the right of the public prosecutor to reduce a charge or not to charge a person if he cooperates and provides information to the police. To further questions by the learned judge, the appellant stated that the allegations in paras. 13, 16 and 18 of DSAI's affidavit are supported by the aforementioned documents – in particular para 2-4 of 'MSD-1'. The appellant also agreed with the learned judge that para 4 of 'MSD-1' is MSD's own conclusion. When referring to para 3, the learned judge asked:

> ... Which part of paragraph 3 suggests that there was a request to fabricate evidence?.

The appellant replied:

> Paragraph 3 must be read with paragraph 4 ...

The learned judge asked further:

> Does item 3 in paragraph 3 suggest that there was a request to fabricate evidence?.

The appellant answered:

> It must be read with paragraph 4.

The learned judge then asked again where in para 3 is the suggestion that a request was made to fabricate evidence. In answer to that the appellant *inter alia,* said:

> The use of the words "creation and collection of evidence which is otherwise not there" suggests that Nalla was requested to give evidence against Dato' Seri Anwar.

To this the learned judge said:

> You say 'to give evidence' - nothing wrong with that. Where is the evidence to show that there was a request to fabricate evidence?.

To this the appellant responded:

> In paragraph 4 the use of words to create evidence means Nalla is asked to create evidence.

The learned judge then asked:

> Are you satisfied that the two documents in question suggests that there was a request to fabricate evidence?.

The appellant replied:

> Yes.

The notes of evidence then revealed the learned judge's remarks which, amongst others, stated:

> In the light of the baseless application filed by you which is totally unsupported by the documents exhibited by you I propose to cite you for contempt for having attempted to undermine the integrity of this trial. Before I do so this court will show mercy towards you by dropping all further proceedings if you tender an unconditional apology to this court, to the AG, to Dato' Gani Patail and to En. Azahar for filing an application which is absolutely baseless and which is an abuse of the process of court. (Court to adjourn for half and hour to enable En. Zainur to think about it.).
>
> 10.45 court adjourns.

When the court resumes its proceedings the appellant informed the court thus – "I have come to a decision that I am unable to tender my apologies." Then the court said:

I shall now cite you for contempt of Court.

- En. Zainur Zakaria, I call upon you to show cause why you should not be punished for contempt of Court for filing a notice of motion with a supporting affidavit which contains scandalous and contemptuous matters, in particular in paragraphs 13, 16 and 18.

At this juncture, Raja Aziz, one of the counsel representing DSAI informed the court that he, together with Haji Sulaiman Abdullah, Christopher Fernando, Gurbachan Singh, Sankara N. Nair, Pawanchik Merican, Kamar Ainiah and Zulkifli Nordin were representing the appellant. Refusing an application for adjournment by the appellant's counsel, the learned judge requested the appellant to show cause immediately. The appellant then gave evidence from the witness box. On this, the notes of evidence shows:

Zainur Zakaria
A/S English
Advocate and Solicitor.

The application was filed upon instructions by my client, Dato' Seri Anwar Ibrahim. And I did so in the discharge of my professional duty. The obligations of an advocate and solicitor is not only found in common law but in our case is also, if I may say, enshrined in our Legal Profession Act, if I am not mistaken Sec. 42 requires an advocate and solicitor to uphold justice without fear or favour. That was my objective in filing this application.

Sgd:
(Datuk Augustine Paul)

No questions by Court.

Sgd:
(Datuk Augustine Paul)

The learned judge then found the appellant guilty of contempt. When asked to address on sentence, the appellant said:

It was not the intention to commit contempt. When the defence team studied the application before filing it was based on the documents exhibited. Our instructions were based on the documents. In the interest of justice it was felt this matter must be brought to attention of Court.

The learned judge then asked the appellant:

You do not wish to tender an apology in the terms that I described earlier?

The appellant replied:

I regret I am unable to do that.

The court then proceeded to convict the appellant and sentence him to three months' imprisonment.

Before us, the learned appellant's counsel submitted that the SD and 'MSD-1' if read together, would show a strong suggestion of fabrication of evidence. The learned counsel contended that the two deputy public prosecutors were trying to fabricate evidence. The learned counsel then invited us to p. 27-30 of the learned judge's grounds of judgment wherein the learned judge, when referring to exh. ID14B, said: "At the time he filed the motion the prosecution had already tendered in evidence exh. IDI4B of which ZZ, being a senior member of the defence tearm must be aware." (ZZ, in the grounds of judgment refers to the appellant).

After quoting the material parts of ID14B, the learned judge then said:

> The pertinent parts of Exhibit ID14B that I have reproduced reveal the involvement of Dato Nallakaruppan in the alleged relationship between the accused and Shamsidar. As this exhibit was in the possession of the prosecution when MSD met AGP, AGP was clearly not asking for "... evidence that is otherwise not there ...". As ZZ was aware or ought to have been aware of the contents of Exhibit IDI4B his acceptance of the conclusion of MSD as appearing in paragraph 4 of the letter is sheer recklessness and negligence at its height. ZZ has in fact expanded on the mildly worded conclusion of MSD to find an allegation which is completely baseless and unsupported by the evidence available to him. As a matter of fact the contents of Exhibit IDl4B ought to have put ZZ on guard when he read the letter.

(The accused in the grounds of judgment refers to DSAI whilst Shamsidar refers to the wife of one Mohamed Azmin). This, urged the learned counsel, showed that the learned judge had gone off tangent and was not dealing with the issues before him.

In response to this submission, the learned counsel for the respondent argued that the relevant parts of the SD and 'MSD-1' did not support the appellant's contention that the two DPPs were trying to fabricate evidence against DSAI. The repondent contended further that an offence under s. 498 Penal Code (*ie* enticing of married women) was disclosed by ID14B. Under the circumstances, the respondent contended that the application of the appellant had the effect of trying to influence the learned judge to hold the view that the evidence so far tendered before him were fabricated. This, consequently, it was submitted had a tendency to obstruct the ordinary course of justice or to prejudice the trial before the learned judge. As such, the respondent argued that the learned judge had the power and duty to summarily deal with the appellant for contempt.

The learned judge in his grounds of judgment referred to *Attorney-General v. Times Newspapers Ltd* [1974] AC 273 at 302 as an authority on the purpose of contempt proceedings. THe learned judge then quoted from Lord Rusell's judgment in *R v. Gray* [1900] 2 QB 36 to show what acts constitute contempt of court. We are accordingly of the view that the learned judge has not erred in his perception of the meaning of contempt of court. In fact, Lord Cross of Chelsea in *Attorney-General v. Times Newspapers Ltd (Supra)* said, at p. 322:

> ... 'Contempt of court' means an interference with the administration of justice...

In the notes of evidence, the learned judge stated that the application of DSAI was baseless because it was totally unsupported by the documents exhibited therein. Accordingly the learned judge held that the application was an attempt to undermine the integrity of the trial of DSAI and also an abuse of the process of court. Thus, according to the learned judge, the appellant had committed contempt of court.

In his grounds of judgment, the learned judge referred to para. of 'MSD-1' – in particular to the following:

> ... To use the death threat as means to the extortion of evidence that is otherwise not there (why else make such a demand?) is unforgivable...

The learned judge then commented thus:

> MSD was in no position to come to such a conclusion in the absence of knowledge of the nature of evidence that is contained in the investigation papers in the hands of the prosecution. The use of the words by him "... (why else make such a demand?) ..." clearly show that his views were based on the assumption that the prosecution did not have any evidence at all and, as a result, he was asked for evidence ... "that is otherwise not there".
>
> ... the conclusion of MSD as contained in paragraph 4 of the letter may be justifiable only if it was arrived at after he had discussed the matter with his client in order to ascertain what the latter knew. The letter is dated 12 October 1998. However, paragraph 8 of the SD states that MSD met his client on 13 October 1998 to convey AGP's demands to him. This shows that MSD came to his conclusion even before he had discussed the matter with his client to find out what the latter knew. I find support for this in paragraph 8 of the SD where MSD had said that there was nothing that his client could have done "... short of lying". This clearly indicated that up to the 13th MSD did not know what his client knew. It cannot be assumed that MSD was aware of what his client knew at that point of time as otherwise there would have been no need for him to refer the matter to his client which he did. For MSD, therefore, to refer to "... the extortion of evidence that otherwise not there ..." is ill-advised.

The learned judge then concluded thus:

> In my opinion, there is no indication, explicit or subtle, direct or indirect, in the request for information against the accused by AGP for the giving of any false information. It was an exercise of lawful powers with no undertones of any impropriety. The conversation that transpired at the meeting as described in paragraph 3 of the letter ought to have made this plain and patent even to the most uninitiated. It follows that the reading of anything else into paragraph 3 of the letter is an act of bad faith calculated to undermine the administration of justice.

Having come to such an opinion, the learned judge then quoted the material parts of ID14B which in brief revealed the involvement of Dato' Nallakaruppan in the alleged relationship between DSAI and Shamsidar. According to the learned judge, ID14B had already been tendered in evidence when the appellant filed the application. Consequently, the learned judge was of the view that the appellant being a senior member of the defence team was or ought to have been aware of the contents of the ID14B. As such, the learned judge found that the appellant's acceptance of MSD's conclusion in para. 4 of 'MSD-1' was "sheer recklessness and negligence at its height". We agree with the learned judge's conclusion and reasonings. We would however add by pointing out that 'MSD-1' reveals that, at the meeting between AGP and MSD, AGP expressed that he wanted Dato' Nallakaruppan in exchange for the reduction of the charge against him (which charge carried the death sentence), in the words used in 'MSD-1', "**to cooperate with them and to give information** against Anwar Ibrahim, specifically on matters concerning several married women" (emphasis added). We however found that para 13 of DSAI's affidavit (quoted above) significantly uses the words "**... dengan secara palsu membabitkan saya ...**" (emphasis added). (The English version as quoted by the learned judge is to the effect "**... by falsely implicating me ...**" (emphasis added). 'MSD-1' uses the words "to give information". DSAI's affidavit uses the words "by falsely implicating me". Hence, we are of the view that the learned judge was correct when he opined that there was "no indication, explicit or subtle, direct or indirect, in the request for information against" DSAI by AGP for the giving of any false information. To transform the words "to give information" against DSAI to "falsely implicate" DSAI can never be justified linguistically – even when the letter is read as a whole. The meanings of the two phrases are obviously poles apart. Clearly therefore, the appellant's allegation of fabrication of evidence by the two deputy public prosecutors as contained in the affidavit in support of the application, are not supported by the SD and 'MSD-l'. Consequently, this act of the appellant is obviously, as correctly put by the learned judge, an act of bad faith. Under such circumstances, we agree with the learned

judge when he held that the appellant's application was an attempt to undermine the integrity of the trial of DSAI and abuse of the process of court. We are, in fact, of the view that the appellant's act and conduct are inherently likely to interfere with the administration of justice as a continuing process in the lower court *(Attorney-General v. Butterworth* [1963] 1 QB 696). In this connection, we would like to refer to para. 18 of DSAI's affidavit which alleges that the deputy public prosecutors' involvement in the trial of DSAI have already raised grave doubts as to the integrity of the evidence which had so far been adduced by the prosecution. This, in our view, is an act that tends to prejudice the prosecution in the trial of DSAI. This is because the allegation that the deputy public prosecutors fabricate evidence has not been supported by the SD and 'MSD-1'. At this jucture, we would like to quote what Lord Hardwick LC in *The St James' Evening Post Case* [1742] 2 Atk 469 said at p. 469 (which was quoted by Lord Reid in *A-G v. Times Newspapers Ltd* [1973] 3 All ER 54, at 60, ie*:*

> Nothing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented; nor is there any thing of more pernicious consequence, than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard.

This, in our view, is most relevant in the light of what the learned judge, in his grounds of judgment, said:

> This assumes monumental significance in this case in view of its extensive publicity both at national and international levels.

Thus, for the reasons stated above, we find that the learned judge was right in holding that the acts and conduct of the appellant sufficiently constituted contempt of court.

The next issue raised by the appellant was the fact that 'MSD-l' was not denied by the AG when MSD met him at his office. The appellant also contended that the AG never sought for an adjournment in order to put in an affidavit-in-reply. As such, the appellant submitted, the learned judge had to accept the contents of DSAI's affidavit the SD and 'MSD-l' as correct. On this issue, the learned respondent's counsel drew our attention to p. 33 of the learned judge's grounds of judgment wherein the learned judge said:

> In considering whether the motion filed by Messrs. Zainur Zakaria and Co. was contemptuous I accepted the description as to what transpired between AGP and MSD at the meeting as stated in the documents annexed to the motion.

At p. 43 of the grounds ofjudgment, the learned judge said:

> The whole basis of the contempt proceedings that I had instituted against ZZ is anchored on what had transpired at the meeting between AGP and MSD based on documents filed by ZZ which I had accepted and which were comprehensive.

Because of these findings, the learned respondent's counsel argued that the AG's failure to file affidavit-in-reply was a non-issue. We agree with the respondent. Consequently, we also agree with the learned judge that the calling of witnesses by the appellant was unnecessary. The learned judge was therefore right in refusing an adjournment to enable the calling of witnesses.

The next attack of the learned appellant's counsel was on the charge which reads: "I shall now cite you for contempt of Court. En. Zainur Zakaria, I call upon you to show cause why you should not be punished for contempt of court for filing a notice of motion with a supporting affidavit which contains scandalous and contemptuous matters, in particular, in paras 13, 16 and 18." The learned counsel contended that there are no adequate particulars in that charge. In reply, the learned respondent's counsel referred us to the case of *Balogh v. Crown Court* [1974] 3 All ER 283 wherein Stephenson LJ, at p. 290, said:

> The power of a superior court to commit (or attach) a contemnor to prison without charge or trial is very ancient very necessary but very unusual, if not indeed unique. It is as old as the courts themselves and it is necessary for the performance of their functions of administering justice, whether they exercise criminal or civil jurisdiction.

We also were referred to a comment made by Mustill LJ, in the case of *R v. Griffin* [88] Cr App R 63 which reads (at p. 67):

> In proceedings for criminal contempt there is no prosecutor, or even a requirement that a representative of the Crown or of the injured party should initiate the proceedings. The judge is entitled to proceed of his own motion. There is no summons or indictment, nor is it mandatory for any written account of the accusation made against him to be furnished to the contemnor. There is no preliminary enquiry or filtering procedure, such as a committal. Depositions are not taken. There is no jury. Nor is the system adversarial in character. The judge himself enquires into the circumstances, so far as they are not within his personal knowledge. He identifies the grounds of complaint, selects the witnesses and investigates what they have to say (subject to a right of cross-examination), decides on guilt and pronounces sentence. This summary procedure, which by its nature is to be used quickly if it is used at all, omits many of the safeguards to which an accused is ordinarily entitled, and for this reason it has been repeatedly stated that the judge should choose to adopt it only in cases of real need.

The learned appellant's counsel referred us to the case of *Coward v. Stapleton* [90] CLR 573 wherein the High Court of Australia, at p. 579 and 580, said:

> Even apart from any such express provision, however, it is a well-recognized principle of law that no person ought to be punished for contempt of court unless the specific charge against him be distinctly stated and an opportunity of answering it given to him: *In re Pollard; R. v. Foster; Exparte Isaacs*. The gist of the accusation must be made clear to the person charged, though it is not always necessary to formulate the charge in a series of specific allegations: *Chang Hang Kiu v. Piggott.* The charge having been made sufficiently explicit, the person accused must then be allowed a reasonable opportunity of being heard in his own defence, that is to say a reasonable opportunity of placing before the court any explanation or amplification of his evidence, and any submissions of fact or law, which he may wish the court to consider as bearing either upon the charge itself or upon the question of punishment.

In *Gamalath Ralalage Daniel Appuhamy v. The Queen* [1963] AC 474 (referred to us by the learned appellant's counsel) Lord Dilhorne LC, at p. 483, said:

> It was clearly established in *In re Pollard,* on a reference to the Judicial Committee of the Privy Council, that no person should be punished for contempt of court, which is a criminal offence, unless the specific offence charged against him be distinctly stated and an opportunity of answering it given to him.

With these authorities in mind, we perused the notes of evidence of the learned judge and found that the notes abundantly show that the learned judge had complied with the principles laid down by those authorities. We are satisfied that the charge contains in clear terms "the gist of the accusation" against the appellant *(Coward v. Stapleton (supra))*. The charge, in the circumstances of the whole proceedings as pictured in the learned judge's notes of evidence, has "distinctly stated the specific offence" against the appellant (*Gamalath Ralalage Daniel Appuhamy v. The Queen (supra)*).

The learned appellant's counsel also urged us to hold that *mens rea* is a necessary element in contempt offences. However, the learned respondent's counsel referred us to several authorities which support his argument that mens rea is not an ingredient of the contempt offence. On this issue, both counsel and the learned judge made reference to the case of *Attorney-General v. Butterwoth & Ors. (supra).* The learned appellant's counsel drew our attention to p. 722 and 723 of the report and in particular to p. 722, wherein, Lord Dening MR, was reported to have said:

> I think the short answer to this contention is that contempt of court is a criminal offence, punishable summarily by the court itself and, like all criminal offences, it requires in general a guilty mind.

On the other hand, the learned respondent's counsel referred us to the following part of Donovan LJ's judgment in the same case at p. 725 of the report:

> I return to the finding in the present case that none of the respondents had any future proceedings in mind or any intention to interfere with the course of justice. I regard that state of affairs as immaterial. The question is whether the respondents' action was calculated so to interfere, and this involves a consideration not of their state of mind on this particular point but of the inherent nature of their act: see as to this the decision in *Reg. v. Odhams Press Ltd., Ex parte Attorney-General*.

At p. 726 Donovan LJ, said:

> I conceive the position, however, to be this. *Reg. v. Odhams Press Ltd., Ex parte Attorney-General* makes it clear that an intention to interfere with the proper administration of justice is not an essential ingredient of the offence of contempt of court. It is enough if the action complained of is inherently likely so to interfere. A newspaper article accusing a man of crime after proceedings have been begun and before his trial plainly answers that description. But there may be other actions where the likely effect is not self-evident, and further inquiry will have to be made. The present case is an instance. The respondents were within their legal rights in seeking to relieve Greenlees from his honorary posts. But if the object of doing so was not merely to exercise that right for the good of the branch but to punish him for the evidence which he gave before the Restrictive Practices Court, and if the taking of such revenge was calculated to interfere with the administration of justice, then it will be no answer for the respondents to say that, while intending to punish Greenlees, still they had no intention of interfering with the administration of justice. Thus far the case is no different from *Reg. v. Odhams Press Ltd., Ex parte Attorney-General*. But where it differs is that in order to determine the likely effect of what the respondents did one has to inquire into their motives. The mere fact that the court has to do this cannot, in my view, involve the consequence that contempt of court has not been committed.

We note that Donovan LJ, had said in no uncertain terms that the existence of any future proceedings in the mind of an offender or the fact that the offender had any intention to interfere with the course of justice was immaterial in the consideration of whether the contempt offence had been committed. We also observe that the remaining judge in the case ie Pearson LJ had, in his judgment, *inter alia*, said at p. 728 of the report:

> In my judgment, however, such victimisation, because it tends to deter persons from giving evidence as witnesses in future proceedings, and giving that evidence frankly and fully and without fear of consequences, is an interference with the due administration of justice as a continuing process, and does constitute contempt of court, and can be dealt with summarily under the inherent jurisdiction.

Pearson LJ used the term "tends" and not "intends". In fact, both Donovan LJ and Pearson LJ, when making those statements addressed themselves to the specific facts before them *ie* interference with witnesses whilst Denning M.R., on the other hand, was making the above-quoted remark in a general context. We agree with the view expressed by both the learned Lord Justices. But before we leave this subject, we would like to refer to the case of *Attorney-General, Malaysia v. Manjeet Singh Dhillon* [1991] 1 CLJ 216. The learned Attorney-General in that case contended that the respondent's honest intention was no defence to a contempt of court charge.

He referred to the case of *Yusof Ali Khan v. State* PLD 970 SC 350 wherein Hamoodur Rahman CJ, *inter alia*, said:

> No one can be allowed to defame, ridicule or abuse a judge in his public capacity even with the best of motives because if that sort of thing were once held to be permissible the whole judicial system would readily be brought into utter contempt.

After referring to this and several other authorities, Mohamed Yusoff SCJ, said at p. 222:

> On this basis I would accept the Attorney-General's contention as a proper statement of the law.

In the same case Gunn Chit Tuan SCJ, referred to defence counsel's argument on *mens rea*. The counsel had referred the court to several cases from Canada. The Attorney-General, however, referred the court to several cases from Pakistan and India to support his submission that the intention of the respondent as a contemnor was immaterial if the court was satisfied that the criticism amounted to contempt. After considering both counsel's submissions, Gunn Chit Tuan SCJ, said at p. 225:

> In this case, there can be no doubt that the respondent intended to affirm the affidavits in question and in paras 7, 9 and 11 of the said affidavit dated 25 April 1989, there are, as already pointed out, statements containing accusations and allegations which were an attack on Justice Tun Dato' Abdul Hamid causing unwarranted and defamatory aspersions on his character, which could be considered to be scurrilously abusive of the judge, thereby

amounting to contempt by scandalizing the court. Even if the respondent was acting on instructions, he has read the statements in his affidavits and must accept responsibility for the contents. (See the Privy Council case of *Vijaya Wickramatunga Vidyasagara v. The Queen*).

In fact Gunn Chit Tuan SCJ, had earlier on said, at p. 224:

> Having considered the circumstances in which the words were uttered or published in the said affidavit, I would prefer to follow the persuasive authority of the Pakistan Supreme Court case of *Yusof Ali Khan v. State*, in which it was held, *inter alia*, that a legal practitioner can be guilty of contempt of court even for language professedly used in discharge of his functions as an advocate.

The passages quoted above, in our view, show that mens rea is immaterial in a contempt of court offence. We would however, at this point, like to refer to the evidence given by the appellant from the witness box to the effect that the application was filed by him on his client's instructions. On this, we would refer to the case of *M.Y. Shareef v. Judges of Nagpur High Court* AIR [1955] SC 19, wherein, at p. 23, Mahajan CJ, said:

> It cannot be denied that a section of the Bar is under an erroneous impression that when a counsel is acting in the interests of his client or in accordance with his instructions he is discharging his legitimate duty to his client even when he signs an application or a pleading which contains matter scandalizing the Court. They think that when there is conflict between their obligations to the Court and their duty to the client, the latter prevails.
>
> This misconception has to be rooted out by a clear and emphatic pronouncement, and we think it should be widely made known that counsel who sign applications or pleadings containing matter scandalizing the Court without reasonably satisfying themselves about the *prima facie* existence of adequate grounds therefor, with a view to prevent or delay the course of justice, are themselves guilty of contempt of Court, and that it is no duty of a counsel to his client to take any interest in such applications; on the other hand, his duty is to advise his client for refraining from making allegations of this nature in such applications.

This statement of Mahajan CJ, clearly, in our view, applies to the appellant. He should have advised DSAI against the filing of the application. He had known of the ID14B at the relevant time. He was also aware of what were facts and what were conclusions in the MSD-1. Accordingly, we are of the view that the learned judge was right in holding that the filing of the application by the appellant "was scandalous, frivolous, vexatious and an abuse of the process of the court ..." and a contempt of court. The learned judge in the court below therefore was right in holding, in the circumstances of the case before him, that the respondent's intention was immaterial and the respondent had consequently committed contempt of court.

It was also submitted by the appellant that the learned judge was wrong in adopting the summary procedure when dealing with the alleged contempt by the appellant. The learned respondent's counsel argued otherwise. On this issue we find that the learned judge had reminded himself of the principles pertaining to the exercise of the summary procedure as laid down by the cases of *Jaginder Singh & Ors. v. Attorney-General* [1983] 1 CLJ 69, *Cheah Cheng Hoc v. PP* [1986] 1 CLJ 169 and *Karam Singh v. PP* [1975] 1 MLJ 229. The Supreme Court had in *Cheah Cheng Hoc*'s case (*supra*) said, at p. 175:

> This power must be used sparingly but fearlessly when necessary to prevent obstruction of justice. We feel that we must leave the exercise of this awesome power to the good sense of our Judges. We will interfere when this power is misused.

The High Court of Australia in *Bell v. Stewart* [1920] 28 CLR 419 had said, at p. 428:

> The only justification for the summary process of a Court punishing a person for contempt is to protect the public by guarding the administration of justice from any obstruction or interference which might affect its purity, its impartiality or its effectiveness.

Blackburn J in *Skipworth & The Defendant's* case [1873] 9 LRQB 230, at p. 233, said:

> When an action is pending in the Court and anything is done which has a tendency to obstruct the ordinary course of justice or to prejudice the trial, there is a power given to the Courts, by the exercise of a summary jurisdiction, to deal with and prevent any such matter which should interfere with the due course of justice; and that power has been exercised, I believe, from the earliest times that the law has existed.

At p. 30 of the grounds of judgment, the learned judge said:

> To further state in paragraph 18 of the affidavit that the involvement of the Senior Deputy Public Prosecutors "... has already raised grave doubts as to the integrity of the evidence ..." adduced by the prosecution in this case is an attempt to undermine the integrity of this trial.

Then at p. 32 of the grounds of judgment, the learned judge said:

> The allegations against the two Senior Deputy Public Prosecutors interfere with the due administration of justice as they are of such a nature as to affect the dignity and authority of the Court's proceedings (see *R v. Collins* [1954] VLR 46). This becomes particularly significant in this case in the light of the immense public interest that it has generated. An allegation that the involvement of the two Senior Deputy Public Prosecutors in this case has

> raised grave doubts as to the integrity of the evidence adduced will seriously affect public confidence in this trial. The motion interferes with the course of justice or has a tendency to do so. I was therefore of the view that the filing of the motion by ZZ was scandalous, frivolous, vexatious and an abuse of the process of the Court with the objective of undermining the integrity of this trial. It had the tendency to deflect the Court from a strict and unhesitating application of the letter of the law and from determining the issues exclusively by reference to the evidence.

With these findings made by the learned judge, it is difficult for us to say that he had, as said by the Supreme Court in *Cheah Cheng Hoc*'s case *(supra)*, "misused" the power of the summary procedure. As such we cannot interfere with the learned judge's exercise of such power.

For the reasons stated above, we dismiss the appeal against conviction.

As to sentence, we find that the learned judge has not taken into consideration any irrelevant matters. Before citing the appellant for contempt, the learned judge, in fact, offered him the opportunity to apologise. But the appellant refused to apologise. Again, after finding the appellant guilty of contempt and before proceeding to convict him of the offence, the learned judge offered him another opportunity to apologise. Again the appellant refused to apologise. An apology might have even changed the nature of the punishment. (*M.Y. Shareef v. Judges* of Nagpur High Court AIR [1955] SC 19).

We note that the learned judge had referred to the case of *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors. v. S.M. Idris & Anor. and Another Application* [1990] 1 CLJ 723. In that case, the 1st and 2nd respondents were advocates and solicitors. And that was a 1990 case. Now the circumstances have changed. We observe that lately there has been an increase in contempt offences being committed by advocates and solicitors. As such we feel that the time is now ripe for imposition of custodial sentence in contempt offences.

The learned judge had also considered the case of *Chandra Sri Ram v. Murray Hiebert* [1997] 3 CLJ Supp 518. In that case a journalist committed the contempt. He was convicted and sentenced to three months' imprisonment. He appealed to this court against the conviction and sentence. This court allowed his appeal on sentence and Denis Ong JCA, at p. 360, said:

> The other factor relevant to sentencing is the matter of apology. I accept that there was an expression of regret by the appellant given early in his affidavit and that was not discourteous or unbefitting having regard to the circumstances which were unclear to him at that point in time. I accept also that there was an offer to apologize by the appellant if he was told where in the said article he had offended. But there was no response to his offer. To my mind, this is not a case where the offender was unwilling to apologize.

In the appeal now before us, no such circumstances exist. The appellant in fact adamantly and arrogantly refused to apologise. We, therefore, respectfully feel that the three months' imprisonment is not excessive. We accordingly dismiss the appeal against sentence.